



September 23, 2002

CQ472

NEPA Task Force
Council on Environmental Quality
P.O. Box 221150
Salt Lake City, Utah 84122

To Whom It May Concern:

On behalf of the 5,000 members of the American Road & Transportation Builders Association (ARTBA), which is the only national association that exclusively represents the collective interests of all sectors of the U.S. transportation construction industry, we applaud the NEPA Task Force for seeking ways to improve and modernize the NEPA process and offer the following comments in response to questions that were published in the July 9, 2002, *Federal Register*. 67 *Fed. Reg.* 45,510.

Streamlining the environmental review process for federally funded transportation construction projects has been a top priority of ARTBA for several years. According to the U.S. General Accounting Office (GAO), "it typically takes 9 to 19 years to plan, gain approval for and construct a new major federally funded highway project that has significant environmental impacts." *GAO Testimony Before the Committee on Environment and Public Works, U.S. Senate*, GAO-02-1067T (Sept. 19, 2002) at 2. The GAO states that "as many as 200 major steps can be involved in developing a transportation project from the identification of project need to the start of construction." *Id.* at 6. The GAO noted that only about three percent of federally funded highway projects require an in-depth environmental impact study (EIS), *Id.*, however, most of these projects are very large and account for a large portion of each state's construction budget in any given year. Many of these projects, while small in number, are very large in terms of cost, often in the range of tens of millions of dollars to over a billion dollars each. These projects also have a very large impact on public safety and mobility for the traveling public.

A recent study by the Federal Highway Administration (FHWA) confirmed that the time required to process environmental documents for large projects has more than doubled over the past two decades. In the 1970s, the average time for completion of an EIS was 2.2 years. In the 1990s, the average time was five years. If federal Clean Water Act section 404 wetland permit issues or NEPA section 4(f) historic preservation or parkland avoidance issues come into play, the average time period grows by an additional two years, on average.



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However, delay is not only limited to large projects that require an EIS. A recent study conducted by the National Academies of Science under the National Cooperative Highway Research Program (NCHRP) concluded that states experience delays in satisfying environmental requirements for small, simple, federally funded highway projects as well. According to the report, 63 percent of all state departments of transportation (DOTs) responding to the survey reported environmental process delays with preparation of categorical exclusions and 81 percent reported similar delays involving environmental assessments. These delays have tripled average review times for categorical exclusions -- from about eight months to just under two years -- and have more than doubled review times for environmental assessments, from under 1.5 years to about 3.5 years.

Many state DOTs have extended their planning schedules to reflect these extremely long delays, which can give the misimpression that the environmental review process is not taking an inordinately lengthy period of time. Other state DOTs do not allocate funds to a project until all of the environmental requirements have been met. This then gives the misimpression that the delays are not being caused by environmental requirements, but by funding constraints. In reality, just the opposite is true.

Delay is the objective of those who seek to stop transportation projects they oppose. In testimony before the U.S. Environment and Public Works Committee on April 29, 1999, Roy Kienitz, then executive director of the Surface Transportation Policy Project said:

"In the struggle between the proponents and opponents of a controversial project, the best an opponent can hope for is to delay things until the proponents change their mind or tire of the fight. It is the only option they have, and so they use it."

Kienitz went on to say:

"There is no good reason for federal approval to take years if there are no major disagreements over the project being proposed. These delays are the most needless of all and are the easiest ones to attack."

Congress has recognized that environmental process delays slow down the delivery of badly needed transportation improvement projects. When Congress passed the Transportation Equity Act for the 21st Century (TEA-21), section 1309 of the Act directed the Secretary of Transportation to develop and implement a coordinated environmental process for highway and mass transit projects. The Act said that this process should include concurrent environmental reviews and establish time periods for completion of all reviews. The FHWA and Federal Transit Administration published a proposed streamlining rule on May 25, 2000. 65 *Fed. Reg.* 33,922. However, the proposed rule fell far short of the mark. In comments to the agencies, ARTBA stated:

"The proposed regulations fail to comply with the statutory requirements to affect streamlining of the transportation project delivery process. To the contrary, the proposal adds many new requirements that will not only lengthen the project delivery process, but also increase project and transportation agency costs."

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In December 2000, the agencies put the proposed rules on hold until the Bush Administration was well in place. In light of the President's September 18, 2002, Executive Order 13274, 67 *Fed. Reg.* 59,449, calling on federal agencies to enhance environmental stewardship and streamline the environmental review process for transportation infrastructure projects, the agencies formally withdrew the 2000 proposed rule and closed the public docket. 67 *Fed. Reg.* 59,225.

ARTBA is continuing to work with Congress and the U.S. DOT to achieve real progress in streamlining the NEPA process for federally funded transportation improvement projects. Currently, ARTBA is working with FHWA on a national scanning tour that will explore best practices the various states have adopted to streamline the process. ARTBA is also working with FHWA on a survey of state DOTs and resource agencies to identify processes that work well to move the process along, as well as to identify common pitfalls. The NEPA Task Force should coordinate with FHWA so that the results of these activities are shared with the Task Force when these projects have been completed.

ARTBA also suggests some "guiding principles" the Task Force should follow as it conducts its review of the NEPA process, particularly as it relates to transportation construction projects. These ideas were recently shared with the Senate Environment and Public Works Committee in a hearing it held September 19, 2002, to examine the status of environmental stewardship and project delivery. Hal Kassoff, vice president of Parsons Brinckerhoff and chairman of ARTBA's Planning and Environmental Working Group offered the following suggestions:

- 1) clarify expectations of both transportation and environmental agencies,
- 2) transform specific processes, and
- 3) hold both transportation and environmental agencies accountable for achieving positive results.

(1) Clarify Expectations

Agencies involved in the environmental review process need to have a clear understanding of their roles and what is expected of them. Attached are 20 suggested expectations -- 10 that would apply to transportation agencies and 10 to environmental resource agencies.

Taking just a few as examples, transportation agencies should be expected to advance projects that reflect environmental sensitivity as a priority. This will help lend substance and meaning to the philosophy of environmental stewardship that the American Association of State Highway and Transportation Officials (AASHTO) and FHWA have been articulating and practicing. At the same time, environmental agencies would be expected to recognize the economic, safety/health and mobility needs for transportation projects, and offer constructive and problem solving ideas that respect their basic purpose. Environmental staffs would work with transportation agencies in a search for win/win outcomes.

To fully appreciate how far the transportation community has come with respect to environmental stewardship, we submit the definition and goals as presented by AASHTO in its Transportation

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Environmental Stewardship Program, which is also attached. One of the key points that AASHTO makes is that environmental stewardship is a voluntary commitment to go beyond the minimums required by law. It can only succeed if states embrace the concept in their own unique ways. It cannot be standardized, nor can it be embodied in a new set of requirements, without defeating the whole purpose of inducing a culture change that encourages going beyond bare minimums.

(2) Changing Processes

Certain processes must be recast if significant improvements in expediting project delivery are to be achieved. Legislation is needed to ensure that these changes occur. They include the following:

U.S. DOT Lead Agency Responsibilities: The U.S. DOT must play a stronger lead agency role in advancing process improvements and in advocating responsible transportation projects. This can be achieved by clarifying DOT responsibilities in defining the purpose and need for transportation projects, in determining the legitimate range of transportation alternatives to be considered, in approving transportation related technical methodologies, in establishing and enforcing reasonable project schedules, including review and comment periods, and in orchestrating the involvement of appropriate agencies.

Streamlined Planning and Environmental Regulations: The U.S. DOT should be directed to change its planning and environmental regulatory approach from an overly complex and prescriptive framework to a more concise, flexible, performance-based combination of rulemaking and guidance that focuses on outcomes. Opportunities to integrate planning and environmental requirements should be offered, but not prescribed, and should be predicated on the notion that guidance derived from duly certified and valid long range transportation planning processes bearing upon such issues as transportation corridor purpose and need, mode selection, and range of alternatives will be acknowledged and have standing in subsequent environmental stages. **For example, duplicative corridor studies that have no standing under NEPA should clearly be eliminated as a requirement.**

Section 4(f) Reform : Legislation is needed in addition to administrative actions that the U.S. DOT might advance, to address Section 4(f) problems that have become a major source of delay. The needed reforms include:

- Integration of 4(f) alternatives as part of the NEPA process
- Review of "feasibility" and "prudence" in a manner that permits weighing the balance and proportionality of diverse impacts
- Allowing satisfactory completion of the Section 106 Historic Preservation process for historic properties to suffice for 4(f) review
- Not requiring 4(f) review for private properties unless they are National Historic Landmarks or fall under some form of legal protective covenant
- Ensuring that Interstate highways and bridges are not subject to Section 4(f) and 106 requirements as "historic" structures or properties

Decision/Dispute Resolution Process: US DOT should be expected to implement a simplified, responsive and effective decision and dispute resolution process to be invoked at the request of a Governor and led by the Secretary or his designee.

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Time Limits to Legal Challenges: A reasonable time limit should apply to the filing of legal actions that challenge the environmental process (90 days seems reasonable).

Delegation of Authority: US DOT and federal environmental resource agencies should be required to implement programs to delegate authority to willing and able state counterpart agencies for environmental assessment/FONSI and categorical exclusion projects, using a post-audit quality assurance process to ensure adherence to federal requirements. Environmental agencies should conserve their limited resources to focus attention upon the relatively small number of projects that involve significant environmental issues. Various models exist for implementing the delegation process, such as Section 404 wetland permitting in New Jersey and Michigan, and Section 106 historic preservation procedures in Vermont. These have been described in a recently completed AASHTO requested study funded under the NCHRP.

(3) Hold Agencies Accountable

Annual Report: Agencies should be required to prepare annual reports on the progress that is being made to achieve a streamlined environmental review and approval process that does not weaken environmental protections. The report should include discussion of process changes and results. Results should be measured in two ways:

- Milestone Durations: Similar to the recent report by FHWA on the time required to process EIS's over the past three decades, a monitoring and reporting framework should be established to determine trends for time required in achieving key milestones, classified by type of project and type of environmental document
- Interagency Cooperation: Building upon a prototype process being developed by the Gallup Organization under contract to FHWA, a peer review "report card" should be implemented to gauge the degree to which expectations are, in fact, being fulfilled by individual agencies. If done well, this approach can foster working relationships in which environmental stewardship as well as environmental streamlining will flourish.

Project Reports: Reports on a project basis should be filed when certain milestone criteria have not been achieved and also in connection with designated projects of national significance.

The need for fixing the environmental review and approval process for transportation projects is real. The problem has been building for decades. On behalf of the transportation construction community, we urge the NEPA Task Force to support reforms that will address these problems in meaningful and effective ways. We appreciate the opportunity to comment on this review process and would welcome future discussion if warranted.

Sincerely,



T. Peter Ruane
President & CEO

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Attachments

Expectations of Transportation Agencies in Expediting Project Delivery

- Advance reasonable projects that reflect environmental sensitivity
- Ensure that the purpose and need are well established and compelling
- Consider alternatives that reflect environmental concerns
- Treat environmental concerns on a par with transportation issues
- Foster an open and interactive project development process
- Encourage early involvement by environmental resource agencies
- Keep unavoidable environmental impacts to a bare minimum
- Develop context sensitive solutions with environmental agency as well as public involvement
- Provide effective mitigation and reasonable enhancements to temper unavoidable impacts
- Adhere rigorously to environmental commitments and monitor effectiveness

Expectations of Environmental Agencies in Expediting Project Delivery

- Uphold and implement environmental laws and regulations
- Recognize the need for environmentally sensitive transportation projects
- Participate early and effectively in transportation project development
- Demonstrate a spirit of cooperation
- Offer constructive and problem-solving ideas that address purpose and need
- Reflect a sense of urgency about meeting schedules
- Implement concurrent processing and a performance approach to permitting
- Apply clear and consistent interpretations of legal and regulatory requirements
- Consider common sense, balance and proportionality consistent with legal and regulatory requirements
- Avoid unnecessary duplication by sharing responsibilities with capable and willing state counterparts

Environmental Stewardship Is: (AASHTO)

- Improving environmental conditions and quality of life when possible, not just complying with regulations
- Careful management of environmental resources and values through partnerships among public and private entities.
- Attitude, ethics, and behavior by individuals.
- Wise choices based on understanding consequences to natural, human-made, and social environment.
- Fulfilling responsibilities as trustees of the environment for succeeding generation, moving toward a cost-effective and environmentally sustainable future.
- Integrating environmental values with partners within all transportation work as a "core business value."

Environmental Stewardship Works Toward: (AASHTO)

- Agency-wide commitment to environmental excellence
- Improved public and regulatory attitudes
- Improved transportation programs and services
- Achieving TEA-21 streamlining goals
- Developing an environmental stewardship ethic
- Overcoming barriers

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Comments
attached